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Supreme Court, U.S.
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No. 91-675

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

BURT H. SAGEN,

Petitioner,

vs.

DISCIPLINARY COUNSEL,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Was petitioner afforded due process of law during disciplinary proceedings where

   a) he was given a full and fair opportunity before the Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court to defend himself against charges made in a complaint issued by Respondent,

   b) the penalty imposed upon petitioner was based upon a finding by the Board that petitioner had violated the Disciplinary Rules as was charged in the complaint, and

   c) the proceedings before the Board of Commissioners were reviewed by the Supreme Court of Ohio?

PARTIES TO THE PROCEEDING

Petitioner

1. Burt H. Sagen

Respondent

2. Disciplinary Counsel of the Ohio Supreme Court.

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STATEMENT OF THE CASE

On August 25, 1989, Respondent ("Disciplinary Counsel") filed a complaint against Petitioner ("Petitioner or Sagen"), alleging numerous violations of the Code of Professional Responsibility. An amended complaint followed on November 2, 1989. After obtaining a time extension, Sagen filed a timely answer.

Three of the incidents alleged in the complaint are particularly relevant. The first ("Count One") arose from protracted litigation between Mr. and Mrs. Robert E. Humphrey and Mr. and Mrs. Vencel Bohaty. In 1969, the Humphreys purchased real estate from the Bohatys on a land contract. The Humphreys later defaulted on payments and the Bohatys sued in the Medina County Common Pleas Court to rescind the contract. The Humphreys retained Sagen as counsel and counterclaimed for specific performance.

The Humphreys prevailed. A June 21, 1976 judgment entry conveyed the property to the Humphreys and ordered that monies previously deposited in escrow on behalf of the Humphreys, plus interest and back taxes, be tendered to the Bohatys. Sagen approved this entry.

The Court of Appeals for Medina County affirmed the judgment of the trial court. However, the escrow agent returned the deposited funds in the amount of $13,361.29 to Sagen, who retained the money. Being unable to obtain this money from Sagen, the Bohatys successfully sued him in the Court of Common Pleas of Cuyahoga County. In October 1985, a jury awarded the Bohatys $13,361.29 plus interest. The Court of Appeals for Cuyahoga County affirmed. To date, however, Sagen has paid nothing to the Bohatys.

The second incident ("Count Two") also stemmed from a real estate transaction. In early 1985, Sagen, by his own admission, signed the name of Richard Cole on a warranty deed transferring property from Cole to Petitioner. Sagen falsely claimed that he had been "designated" as "Richard Cole" in a "trust agreement" between Petitioner and Margaret

Cole, Richard Cole's sister. The alleged "trust agreement," however, was no more than a property agreement that said nothing about Sagen's so-called "designation" as Richard Cole.

The third incident ("Count Five") involved Sagen's representation of Helen Szakacs, a long time client. According to a judgment entry from a resulting lawsuit, Szakacs, in her later years, was befriended by Paulette and Judith Bobko. In January 1984, Szakacs prepared a holographic will devising her Kuenzer Drive home in Seven Hills, Ohio, and a commercial property on Pearl Road in Parma to Judith Bobko. It also devised a Florida property to Paulette Bobko and also indicated that Szakacs's Virginia Road property in Parma could not be sold without first giving the tenant, Bernice Pyle, an opportunity to buy it.

On July 25, 1984, two quitclaim deeds were executed that became the source of later controversy. The first deeded a remainder interest in the Pearl Road property to Sagen. The second deeded a remainder interest in the Virginia Road property to Bernice Pyle, Sagen's long time associate.

In October 1984, Szakacs retained a new attorney, Bradford Zelasko, and asked him to prepare a new will. Apparently, she reiterated to him her desire to have the Bobkos receive the Pearl and Virginia Road properties on her death. The will prepared by Zelasko bequeathed $25,000 to Sagen with the residue of the estate going to the Bobkos.

Szakacs died on November 11, 1984. On November 16, Sagen recorded the Pearl and Virginia Road deeds. Szakacs's will was admitted to probate the following March. In August 1985, Paulette Bobko, Szakacs's executrix, and Judith Bobko commenced a declaratory judgment action seeking, among other things, to have the Pearl and Virginia Road properties returned to the estate.

The Cuyahoga County Court of Common Pleas, Probate Division, by judgment entry of January 6, 1988, ordered the property returned to the estate. The court of appeals affirmed

that judgment. *See Bobko v. Sagen,* 61 Ohio App. 3d 397, 572 N.E.2d 823 (1989).

A panel of the Board of Commissioners on Grievances and Discipline of the Supreme Court ("panel") heard these and other allegations during the course of a two-day hearing on June 21 and 22, 1990. After considering the testimony of numerous witnesses and the exhibits, the panel concluded that the allegations contained in Counts One, Two and Five were true but dismissed two remaining counts. The panel emphasized Sagen's propensity for placing the blame for his actions on others and his "remarkable lack of insight into his situation."

As to Count One, the panel found that Sagen had violated DR 1-102(A)(3) (illegal conduct involving moral turpitude), 1-102(A)(4) (conduct involving dishonesty, fraud, deceit or misrepresentation), 1-102(A)(5) (conduct adversely reflecting on fitness to practice law) and 9-101 (appearance of impropriety). As to Counts Two and Five, the panel found that Sagen had violated DR 1-102(A)(4)-(6) in each count. The panel recommended that Sagen be disbarred from the practice of law in Ohio. The board adopted the recommendations of the panel. The Ohio Supreme Court adopted the findings of fact, conclusions of law and recommendation of the Board. *Disciplinary Counsel v. Sagen,* 61 Ohio St. 3d 62, 572 N.E.2d 658 (1991), *rehearing denied,* 61 Ohio St. 3d 1432, 575 N.E.2d 220 (1991). Sagen was permanently disbarred from the practice of law in Ohio.

ARGUMENT

I. THIS CASE DOES NOT WARRANT AN EXERCISE OF THIS COURT'S JURISDICTION.

Rule 10 of the Rules of the Supreme Court of the United States provides the basic criteria for determining whether a case warrants the issuance of a writ of certiorari.

* * *

> (a) When a United States court of appeals has rendered a decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United Stated court of appeals.
>
> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

This case does not satisfy any of these criteria.

First, Petitioner has failed to identify a conflict between the decision in this case and any of the types of decisions discussed in Rule 10(a)-(c). Second, there is no suggestion that the court below "departed from the accepted and usual course of judicial proceedings." See Rule 10(a). Consequently, there is no need for "an exercise of this Court's

power of supervision." *See Id.* Third, this case does not involve "an important question of federal law" that needs to be "settled by this Court." *See* Rule 10(c). Although Sagen argues that the proceedings before the Board violated his right to due process of law, this Court will find, upon review, that none of his accusations constitute a cognizable Fourteenth Amendment claim.

II. PETITIONER WAS ACCORDED DUE PROCESS OF LAW IN THE PROCEEDINGS BEFORE THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE AND THE SUPREME COURT OF OHIO.

A. The Ohio Supreme Court's Judgment Disbarring Petitioner Was Based Upon Findings Made By the Board Of Commissioners On Grievances And Discipline That Petitioner Had Violated The Code Of Professional Responsibility As Was Charged In The Complaint Against Petitioner And Not Upon Matters Offered For The First Time During The Course Of His Disciplinary Hearing.

Sagen contends he was denied due process of law in the disciplinary proceedings against him. He relies on *In Re Ruffalo,* 390 U.S. 544 (1968), as authority.

In *In Re Ruffalo,* the Court held that an attorney subject to disciplinary proceedings was denied procedural due process when a disbarment offense was based upon charges that arose during the disciplinary proceedings. The Court determined the attorney was denied fair notice as to the subject matter of the grievance procedure and the precise nature of the charges against him, and as such, the attorney was denied due process in the disciplinary proceedings. 390 U.S. at 591

In contrast, Sagen's disbarment was based upon charges contained in the complaint filed by the Disciplinary Counsel.

Those charges were considered during an evidentiary hearing before the Board of Commissioners. After testimony was taken from "[a]ll the major players" and all documentary evidence was introduced, the Board determined that Sagen violated the Rules of Professional Responsibility and recommended to the Supreme Court of Ohio that he be disbarred. On review of the record, the court adopted the recommendation of the Board.

It is true that one witness testified concerning an incident that was not one of the specific instances of misconduct referred to in the complaint. But Sagen was *not* disciplined for his conduct in respect to this incident. Thus, the facts of *In Re Ruffalo* are inapposite to the facts of this case.

B. The Disciplinary Proceedings And Sanction Imposed Upon Petitioner Were Consistent With Due Process Of Law

Sagen recites a litany of faults with the disciplinary proceedings that he believes violated his right to due process of law. However, even a cursory examination of Petitioner's allegations shows that he was not deprived of due process of law.

1. Sagen claims that he was denied due process of law because the Ohio Supreme Court's opinion in this case did not mention that he filed constitutional objections to the Board's findings. *See* Petition for Cert. at P. 18. But nothing in the decisions of this or any other court holds, or even suggests, that a violation of due process occurs when an appellate court, in what amounts to a summary affirmance, chooses not to address and refute individually all defenses raised during the course of the proceedings below.

2. Sagen next claims that the Ohio Supreme Court's opinion does not show what the claimed violations were. This contention, however, ignores the fact that the Board offered a full explanation of the conduct for which he was disciplined and that the Supreme Court of Ohio adopted the findings of fact, conclusions of law and recommendation

of the Board. The Ohio Supreme Court was not obligated to restate the conduct at issue.

3. Sagen also argues that the penalty imposed upon him by the Board and adopted by the Ohio Supreme Court was too harsh and was based upon irrelevant matter, namely, the Board's perception that Petitioner had an "attitude problem". *See* Petition for Cert. at P. 23. Rule V, § 7 of the Supreme Court Rules for the Government of the Bar provides that "any Justice, judge, or attorney found guilty of misconduct shall be disciplined as follows:"

(a) a permanent disbarment from the practice of law, or,
(b) suspension for an indefinite period from the practice of law subject only to reinstatement as hereinafter provided, or,
(c) suspension for a period of six (6) months to two (2) years from the practice of law, which suspension may be stayed in whole or in part, or,
(d) probation for such period of time and upon such conditions as the Supreme Court determines, but only in conjunction with a suspension ordered pursuant to Section 7(c) of this Rule, or,
(e) a public reprimand.

Sagen's sanction was consistent with these rules. The sanction he received, therefore, did not violate his right to due process of law.

4. Finally, Sagen asserts that his right to due process was violated when the Ohio Supreme Court in effect permitted the doctrine of offensive collateral estoppel to be applied to his case. *In Parklane Hosiery Co. v. Shore,* 439 U.S. 322 (1979), the Court recognized the use of offensive collateral estoppel in legal proceedings. Offensive collateral estoppel may be invoked by a plaintiff who seeks to estop a defendant from relitigating the issues which the defendant previously litigated and lost against another party in a

previous lawsuit. *Parklane Hosiery,* 439 U.S. at 331.

In this case, the Board adopted the findings made by an Ohio court of common pleas in a related civil suit involving *Sagen. See Bobko v. Sagen,* 61 Ohio App. 3d 397, 572 N.E. 2d 823 (1989). The Ohio Supreme Court, by adopting the recommendation of the Board, approved the Board's reliance on offensive collateral estoppel to prevent Sagen from relitigating issues that he previously litigated and lost in *Bobko.*

Sagen argues, however, that the Ohio Supreme Court, in *Kirschbaum v. Dillon,* 58 Ohio St. 3d 58, 567 N.E. 2d 1291 (1990), rejected the use of offensive collateral estoppel in attorney disciplinary proceedings. Sagen misreads *Kirschbaum.*

In *Kirschbaum,* the Ohio Supreme Court held that findings of fact arrived at by the Board of Commissioners could not be relied on in a court proceeding. In the case at bar, the Ohio Supreme Court implicitly concluded that *findings of fact made by a court* could be utilized in a disciplinary proceeding. Thus, there is no inconsistency between *Kirschbaum* and this case.

Even if there are inconsistencies between *Kirschbaum* and this case, the most that Sagen can establish is a violation of *Ohio* law. Consideration of state law questions, however, are beyond the jurisdiction of this Court. Consequently, whether the Ohio Supreme Court acted contrary to state law when it permitted offensive collateral estoppel to apply in this case is not an appropriate subject for review.

CONCLUSION

For the preceding reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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